NOS. 21435 & 21436

See Vol. 3591

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. RUSSELL PENNY,
State Supervisor, etc.,

Appellants,

vs. No. 21435

THE DREDGE CORPORATION,

Appellee.

E. J. PALMER,
State Supervisor, etc.,

Appellants,

vs. No. 21436

THE DREDGE CORPORATION,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
UNITED STATES DISTRICT COURT FOR NEVADA

GEORGE W. NILSSON

Suite 1131 Petroleum Building
714 West Olympic Boulevard
Los Angeles, California 90015
RI 7-9211

Attorney for Appellee

Of Counsel
Deaner, Butler & Adamson
109 Third Street, Suite 211
Las Vegas, Nevada 89101
DUdley 2-6911

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PETITION FOR REHEARING

Comes now the Dredge Corporation, a Nevada Corporation, the appellee in both cases, herein, by George W. Nilsson, its attorney and prays that this Court grant a rehearing in both cases to determine questions of law and fact hereinafter set out, and to correct the inequities created by said decision.

These questions grow out of the decision herein of this

Court dated June 26, 1968. The appellee presents this, its petition for rehearing, and in support thereof respectfully shows:

(a) Was the so-called "marketability at a profit" test ever published in the Federal Register? If not, it is invalid under the Administrative Procedure Act, (5 U. S. C. 552).

(b) Does the sand and gravel covered by the Dredge claims have "distinct and special value" within the meaning of the mining laws.

(c) Does the definition of "Common Varieties" by the Department of the Interior dated September 7, 1962 and published in 27 Federal Register on September 14, 1962, exclude the Dredge Corporation's sand and gravel from "common varieties" even though there is sand and gravel found in the area outside the claims?

(d) Since the Common Varieties Act excludes any mineral otherwise a common variety, if the deposit includes other minerals, evidence should be taken to determine whether the Dredge claims contain any other minerals, because this question was not put in issue by the Complaint in Contest, or tried before the Hearing Examiners because the Common Varieties Act was not an issue in the contest.

(e) The phrase "marketability at a profit" is unconstitutional because it is vague, indefinite and uncertain. At the Contest hearing both "market" and "profit" were proved.

I

THIS COURT SHOULD TAKE JUDICIAL NOTICE OF THE FOLLOWING:

The Supreme Court of the United States in its decision of April 22, 1968, United States v. Alfred Coleman, states that the "Marketability at a Profit" test is " * * * a logical complement to the 'prudent man test' * * * ". This new test is then an addition or amendment to the prudent man rule, and under the Administrative Procedure Act (5 U.S.C. §552) (1946) should have been published in the Federal Register.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time almost every year. They are entitled "Lode and Placer Mining Regulations". Appellees procured one such pamphlet before starting their locations in 1952. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit". One pamphlet is entitled: "Mining Claims; Questions and Answers". It is dated 1963. We quote from the bottom of page 3 and at the top of page 4:

> "There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. Commercial grade ore is not required but mere traces, isolated bits of mineral or minor indications are

not sufficient to satisfy the 'prudent man' rule."

(Emphasis added)

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit". We call attention to the following language in the above quotation: "COMMERCIAL GRADE ORE IS NOT REQUIRED * * * "

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit".

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

In the various pamphlets referred to, a careful examination will show that "marketability at a profit" is not referred to, so that the public knows nothing about it after reading the government pamphlets and, based thereon, locating mining claims under the old, well known, "prudent man" test.

The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States in a number of cases; one of the latest decisions being Best v. Humbolt Placer Mining Company, 371 U.S. 334 (Jan. 14, 1963), with no reference to "marketability at a profit".

The "marketability at a profit" test being an addition to the prudent man rule in order to be of legal effect would have to

have been published in the Federal Register as provided by the Administrative Procedure Act, 5 U.S.C. §552 (1946), particularly subsection E which provides that:

> " * * * each amendment, revision or repeal of the foregoing"

must be so published.

Said §552 further provides:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * * "

Since the "marketability at a profit" test was not published by the Department of the Interior in the Federal Register to inform the public how to locate mining claims on the public domain, is not publicized in pamphlets, said test is illegal and ineffective as to Dredge Corporation's problems in these cases.

II

THIS COURT SHOULD ALSO TAKE JUDICIAL NOTICE OF THE DEFINITION OF COMMON VARIETIES AS PUBLISHED BY THE DEPARTMENT OF THE INTERIOR ITSELF. SUCH DEFINITION IS CONTAINED IN AN AMENDMENT TO REGULATION 185.121(b), ISSUED UNDER DATE OF SEPTEMBER 7, 1962 AND PUBLISHED IN THE FEDERAL REGISTER OF SEPTEMBER 14, 1962 AT PAGES 9137-38. IT CONTAINS THE FOLLOWING WORDS:

"Mineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation."

This was recognized by this Court in its opinion in the case of United States v. Alfred Coleman, et al, dated June 21, 1966, 363 Fed. 2d 190 at 199:

"The Department's 'quantity equals common variety' formula is not consistent with either the letter or the spirit of the 1955 statute, and represents a departure from the earlier and, * * * "

Subparagraph (b) of the regulation as published in 27 Federal Register of September 24, 1962 is attached hereto as EXHIBIT "A".

The above amended definition of common varieties is now subparagraph (b) of §3511.1 of 43 Code of Federal Regulations. In the revision of January 1, 1966 this appears at page 626.

Evidence should now be taken in a new contest proceeding to determine whether the Dredge Corporation sand and gravel is not a common variety because it comes within the exception quoted above from the amended regulation dated September 7, 1962 and published in 27 Federal Register on September 14, 1962.

It is the fact that the Dredge claims were located in 1952, long prior to the passage of the Common Varieties Act in July 1955 and therefore by the terms of that law were excluded from its provisions.

In addition to this fact, the Complaints in Contest which initiated these proceedings were dated October 28, 1955, approximately three months after the passage of said Act, but did not contain any charge under this Act.

Under these facts the Department of the Interior was precluded from asserting the Common Varieties Act in any of the proceedings or decisions. To permit such use by the Department of the Interior is unconstitutional as depriving the Dredge Corporation of due process of law. This is an additional reason that a rehearing be granted herein and a new contest ordered.

Since the matter of Common Varieties was not included in the hearings before the hearing examiners Dredge Corporation had no opportunity to present any evidence to show that its sand and gravel was not a common variety. In order to show this the Dredge Corporation should be given the opportunity, in a new Contest proceeding, to present evidence proving that its sand and gravel does have "distinct and special value" and thus is not a

"common variety".

The Common Variety Law, 30 U.S.C. §611 contains the following exception:

> " * * * Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. * * *" (Emphasis added.)

As Dredge Corporation's sand and gravel does contain other minerals, it should be given the opportunity to prove this by the presentation of evidence of that fact in a new Contest proceeding, which it could not at the contest hearings because the Common Varieties Act was not in issue in the Contest proceedings before. See copy of assay marked Exhibit "B" and attached hereto.

III.

THE DEPARTMENT OF THE INTERIOR IN THE SUMMARY OF ITS DECISION DATED DECEMBER 29, 1959, BY THE DEPUTY SOLICITOR ON APPEAL TO THE SECRETARY STATED:

> "To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void."

There was no such charge in the contest complaint and that question was not raised at the hearing. Therefore, it was NOT an issue.

What does "market" mean, and what does "profit" mean?

The testimony before the hearing officers was that Dredge Corporation sold sand and gravel from time to time for years at a price which was more than it cost to produce it.

Dredge Corporation proved profit. It certainly had to make a profit right along so it could continue to work and develop the property for many years. This is proof of profit. Its work and sales increased the value of its mining claims which also proved profits.

What does "market" mean, and what does "profit" mean in the additional clause "marketability at a profit" which the Department has illegally added to the prudent man rule? The term is vague, indefinite and uncertain.

The Supreme Court of the United States has repeatedly declared laws invalid because they are vague and uncertain. In the term of that court just closed there are at least two cases which decide this question.

(a) Zwickler v. Koota, 389 U.S. 241 (Dec. 5, 1967), 88 Supreme Court Reporter, p. 391.

(b) Interstate Circuit Inc. v. City of Dallas, decided April 27, 1968, 88 Supreme Court Reporter 1299, 1303.

For another late case on vagueness, see Keyishian v. Regents of New York University, in connection with the New York loyalty oath law, 385 U.S. 589, 87 Supreme Court Reporter 675 (decided January 1967).

The term "marketability at a profit" is not only illegal because never published in the Federal Register, it is also

unconstitutional and void because it is vague, uncertain and indefinite.

IV

THE COURT REFUSED TO TAKE INTO ACCOUNT THE LOSS OF EXHIBITS IN BOTH OF THESE CASES.

This Court states in its decision (page 7):

"The Corporation argues that the district court judgment setting aside the agency decision should be affirmed because the agency records are faulty and incomplete. We have looked into this matter and find the contention to be without merit. The omissions are minor, have no relevance to the issues before us, and are not, in our view, prejudicial."

There is nothing more important to prove the presence of mineral and its value than the samples of ore from a mining property. These samples of ore were part of the exhibits in each case and were lost while in the possession of the Department of the Interior.

This Court stated in its opinion herein (page 6):

"On his review of the hearing examiner's decision in the Palmer case, the Director of the Bureau reviewed the evidence adverted to by the examiner and found to the contrary concerning the value of the deposits on these six claims. Among other things, the Director found, in effect, that even in the claim Number 54 area, which was

potentially the most valuable in this group, the gravel is coated with a calcareous substance and is used only for road, parking lot and fill purposes . . . " (Emphasis added).

The Director of the Bureau of Land Management did not have the Dredge Corporation samples of sand and gravel (Exhibits) and consequently did not know whether the Dredge Corporation sand and gravel was coated with a calcereous coating or not. He could not make a visual examination of the sand and gravel samples (Exhibits) because they had been lost and were not before him.

The Secretary of the Interior acting through a deputy Solicitor on appeal likewise could not examine these samples and this Court could not examine them to see for itself that there was not, and there is not, a calcareous coating on the said and gravel from these Dredge claims.

The purpose of introducing the samples of sand and gravel as exhibits was to refute any such claim.

This clearly shows that the loss of these samples is highly relevant to the issues in these cases and their loss is very prejudicial to the rights of appellee Dredge Corporation.

In a new contest, if ordered by this Court, appellee can introduce evidence to prove its sand and gravel is of high grade.

To proceed otherwise is prejudicial and is not due process.

What can be lost if a new contest is ordered by this Court? The Government would surely suffer no impairment of its rights. Only the appellee will suffer by a denial herein to a new contest

hearing on the issues raised.

V

THIS COURT HAS NOT DISPOSED OF ALL THE ISSUES BEFORE IT IN THESE TWO CASES.

This Court stated in its decision:

"... Since, however, the agency record and the contentions of the parties with respect to the sufficiency of the evidence are fully before us, and in view of the length of time which has transpired since the Palmer and Penny contest proceedings were initiated in 1955 and 1957, we elect to proceed with the appeals and determine all of the issues at this time." (Emphasis added.)

Appellee in its brief (page 2) stated:

"A further significant fact is that the decision of the Secretary in Case No. 366 was consolidated with and made a part of a decision in unrelated contest proceeding (The Clear Gravel Co.) in which the Dredge Corp. had no connection or interest and was not a party.

"This merging in the Secretary's decision of two different and unrelated contest proceedings was improper and prejudicial to Dredge Corp. The two

contest hearings involved were held on two different dates and covered two different and entirely separate mining properties owned by two different companies. This action by the Secretary was sufficient to have caused the District Court to reverse the Secretary's decision in Case No. 366 on this gross error alone."

This Court did not determine this important point in appellee's Case No. 366 (This Court's number 21435).

The Secretary in his consideration and decision violated Dredge Corporation's constitutional right to a fair and impartial determination on its appeal on the evidence of its Contest proceeding alone. The decision of the Secretary was merged with another Contest proceeding held on a different date in which Contest, evidence was introduced by a different Contestee which had no bearing on the Dredge Corporation claims. No doubt samples of sand and gravel were introduced at that contest which the Secretary may have viewed as belonging to Dredge Corporation.

This may be the answer to the contention by the Director of the Bureau of Land Management and of the Secretary that the sand and gravel of the Dredge Corporation contained a calcareous coating. Neither of these two officials ever saw the Dredge Corporation samples (exhibits) of sand and gravel.

It is significant that the Hearing Examiner who admitted the samples as exhibits and examined them, found six of the claims valid and the sand and gravel of fine quality.

Contrary to the statement of this Court in its opinion at

at page 6 above quoted regarding the six claims and the decision of the Director of the Bureau of Land Management, the following is a portion of the decision of the Hearing Examiner based on the evidence before him:

> " . . . Although many trenches and pits had been dug, none of the workings was of great depth except the operating Wells Cargo pit extending into Dredge Nos. 54 and 55. Hardpan was also found at the bottom of the pits.
>
> "There was, however, additional evidence which must be considered in a determination of the validity of these claims. Material had been removed from four of the claims, hauled to the plant for processing, and sold. Immediately adjacent to the claims and extending into Dredge Nos. 54 and 55 is a gravel pit and operating sand and gravel plant which produced 152,106 tons of base material and 21,480 tons of asphaltic concrete in 1955, and 48,000 tons of crushed gravel base material and 81,875 tons of asphaltic concrete in 1956. Mr. Stone testified that the character, content, and geology of the lands embraced within the claims in the third group are similar to those of the land upon which the Wells Cargo pit are located. Mr. Hartman testified that the laminated material encountered within the pit was not caliche or cemented gravel and that it is

not detrimental when found in material used in asphaltic concrete.

"As the contestee has shown that the material from the existing pit can be removed and sold at a profit, and as it has been shown that the material in the adjacent claims in the third group is of like quality to that found in the operating pit, I find that a prudent man would be justified in developing these claims.

"The testimony of Mr. Starr Hill, Jr. and of Mr. Lovejoy, to the effect that only a few of the existing operating sand and gravel plants were in actual operation when they were visited in an attempt to show that the market for sand and gravel in the Las Vegas valley is already adequately supplied, was effectively refuted by the contestee's exhibits showing that the business activity and construction activity in the Las Vegas valley did not decline during 1956 but, on the contrary, increased, and that the expectation was that it would increase still more in the ensuing years.

"I therefore conclude that Dredge Nos. 52, 53, 54, 55, 56 and 57 are valid claims." (Emphasis added.)

The Director of the Bureau of Land Management neglected to discuss in his decision the fact that Dredge Claim No. 55 was a

part of the operating pit of Wells Cargo Co. the same as the southwest quarter of Dredge No. 54 which was excluded from the contest as being valid.

Since the southwest quarter (25%) of Dredge Claim No. 54 is admitted to be valid and was not contested, the whole of Claim No. 54, was and is valid because the Supreme Court of the United States and other courts have held that only one discovery is required to validate all of an association placer mining claim.

The same argument applies to Dredge Claim No. 55 since it like Dredge Claim No. 54 is a part of the operating pit of Wells Cargo Co. who is lessee of all six claims Nos. 52, 53, 54, 55, 56 and 57. See Title 30 United States Code Annotated (Mineral Lands and Mining), page 322, Note 3, where numerous cases are cited in support of this principle.

Denial to Dredge of title to these two claims, Dredge Nos. 54 and 55, is taking its property without due process of law and is unconstitutional.

Justice demands that a rehearing be granted herein and that a new contest be ordered.

Great weight is usually given by this Court to the findings on the evidence by the trial court (Hearing Examiner) because that court has the opportunity to observe the demeanor of the witnesses, the appearance of the exhibits, and the credibility of the evidence, etc.

In any event, two separate cases, involving two entirely separate contestees, with Contest proceedings on different dates;

with evidence of a different nature and extent involving mining properties miles apart, should not be considered jointly by the Secretary of the Interior and the cases merged into a single decision. This is unconstitutional and is not due process and a new Contest proceeding should be ordered by this Court to get the facts straight for the Dredge Corporation. (See copy of summary of the combined decision marked Exhibit "C" attached hereto.)

In another contest proceeding where the evidence was unsatisfactory and inconclusive the Bureau of Land Management, in its decision on appeal ordered a new contest and stated:

> "Where the evidence as to discovery on mining claims is unsatisfactory and inconclusive, the case will be remanded for a further hearing." United States v. Clark County Gravel, Rock and Concrete Co., Contests 3343, 061806, 061808, 064495 (Nevada), decided June 20, 1968.

Another Contest proceeding where a new hearing was ordered by the Department of Interior because of unsatisfactory and inconclusive evidence is United States v. Irving Rand, et al., A 30036 (October 19, 1964).

CONCLUSION

The questions raised in this petition are due principally to the fact that Dredge Corporation at the contest hearings did not have an opportunity to meet the questions now raised.

The charges in the contest complaints are not the basis of the decision by the Deputy Solicitor on appeal to the Secretary.

The question of the Common Varieties Act -- Public Law 84-167, passed July 23, 1955, was not charged in the contest complaint so Dredge Corporation had no opportunity to meet such issue. Therefore, that law should have no bearing on the decision of this case.

The reasons given by the Director of the Bureau of Land Management and by the Deputy Solicitor acting for the Secretary for reversal of the decision of the Hearing Examiner were based on issues that were not before the Hearing Examiner. Therefore, these reasons and reversal should have no bearing on this case.

The Supreme Court in the case of Ex rel Wilbur v. Krushnic, 280 U. S. 304 (1960), specifically decides that mining claims are property in the fullest sense of the word.

See also Secretary Seaton's decision in United States v. O'Leary, 63 I. D. 341, 345 (1956).

Dredge Corporation located its claims in 1952, long before the passage of the Common Varieties Act. That Act specifically applies only to mining claims located after its passage, therefore it should not be used in this case against Dredge Corporation

mining claims.

To permit the Department of the Interior to hold the Dredge mining claims to be void, for illegal and inapplicable reasons, is to deprive Dredge Corporation of its property without compensation and without due process of law, therefore such action is unconstitutional and void.

WHEREFORE, appellee Dredge Corporation prays:

1. That this Court grant a rehearing herein in both cases; and,

2. Such other relief as the Court may deem fitting and proper.

Respectfully submitted,

GEORGE W. NILSSON

Attorney for Appellee,
DREDGE CORPORATION

OF COUNSEL:

Deaner, Butler & Adamson

EXHIBIT "A"

Title 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

SUBCHAPTER L—MINERAL LANDS

[Circular No. 2089]

PART 185—GENERAL MINING REGULATIONS

Common Varieties: Defined

Paragraph (b) of § 185.121 is revised in its entirety as follows (and the footnote 2 is deleted):

§ 185.121 *Common varieties: defined.*

• • • • •

(b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commerical value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

JOHN A. CARVER, Jr.,
Acting Secretary of the Interior.

SEPTEMBER 7, 1962.

[F.R. Doc. 62-9134; Filed, Sept. 13, 1962; 8:46 a.m.]

(Emphasis added)

Published in 27 F.R. September 14, 1962 - Effective upon publication.

Circular Distribution List

INTERIOR--PORTLAND, OREGON

EXHIBIT "A"

EXHIBIT "B"

AUER LABORATORIES
outh San Pedro Street
les, California 90013
EISENHAUER JR.
HAUER RAYMOND
E EARL RAYMOND

ASSAY CERTIFICATE

PHONE 628-99

Los Angeles, Calif. May 3/67 19

I hereby Certify that the samples described below, received from

William A. McCall

assay as follows:

rk and Sample	GOLD		SILVER		TOTAL VALUE PER TON	PERCENTAGE	
	OZS. PER TON	VALUE PER TON	OZS. PER TON	VALUE PER TON		COPPER	LEAD
+1/8	.03	$ 1.05	.60	$ .77	$ 1.82		
20	trace		.10	$k .12	$ .12		
	trace		.13	$ .15	$ .15		
8 +1/8	.05	$ 1.75	.62	$ .80	$ 2.55		
20	trace		.11	$ .13	$ .13		
	.005	$ .18	.19	$ .24	$ .42		
+1/8	.06	$ 2.10	.71	$ .92	$ 3.02		
20	trace		.08	$ .09	$ .09		
	trace		.12	$ .15	$ .15		
+1/8	.09	$ 3.15	.66	$ .85	$ 4.00		
20	trace		.06	$ .07	$ .07		
	trace		.09	$ .10	$ .10		
	.04	$ 1.40	.51	$ .66	$ 2.06		

PER OZ.

PER OZ.

29

C.

CHARGES $ 52.00

Ed Eisenhauer

ASSAYER

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EXHIBIT "B"

EXHIBIT "C"

CLEAR GRAVEL ENTERPRISES, INC.
THE DREDGE CORPORATION, INC.

A-27967
A-27970

Decided DEC 29 1959

Mining Claims: Discovery

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void.

Mining Claims: Discovery--Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

EXHIBIT "C"